Office - Supreme Court
FILED
JAN 28 1942
CHARLES ELMORE CRO
OLE

Supreme Court of the United States

October Term, 1941

No. 908

NEW YORK AND LONG BRANCH RAILROAD COMPANY
Petitioner

v.

THOMAS M. FURY,
Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

HOWARD L. KERN
WM. F. HANLON
Counsel for Petitioner
Office and Post Office Address
143 Liberty Street
Borough of Manhattan
City of New York

INDEX

PAGE

PETITION 1

Summary Statement of the Matter Involved 1
Jurisdiction 4
Question Presented 5
Reasons Relied on for Allowance of the Writ 5

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 7

Opinions of Courts Below 7
Jurisdiction 7
Statement of the Case 7

ARGUMENT 10

POINT A.—From the very nature of the employee's duties to inspect and maintain signal equipment used in connection with interstate commerce by rail the employee was engaged in interstate transportation or in work so closely related to it as to be practically a part of it 10

POINT B.—It is entirely immaterial that the employee in the case at bar had started home and was not manually engaged upon his duties at the time of his injury 11

POINT C.—The Federal Employers' Liability Act is dominant and exclusive and supersedes the New Jersey Workmen's Compensation Act in all cases to which the former statute is applicable 13

POINT D.—The error of the court below resulted from its emphasis upon the employee's manual inactivity "at the moment of injury" instead of upon the nature of the duties usually performed by him and in which he had been engaged on the day of the accident 13

POINT E.—Conclusion 15

32606

Statutes Cited

Federal

PAGE

Judicial Code as amended February 13, 1925, c. 229, 43 Stat. 937 (28 United States Code, Sec. 344 (b)) 4

Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (45 United States Code, Sections 51 *et seq.*) 4

State

New Jersey Workmen's Compensation Act (c. 95, Pamphlet Laws of New Jersey, 1911, as amended, now R. S. N. J. 1937, Title 34, c. 15) 1

Authorities Cited

Boston & Maine R. Co. v. Armburg, 285 U. S. 234 14

Chesapeake & Ohio Ry. Co. v. Stapleton, 279 U. S. 587 .... 10, 11

Erie Railroad Co. v. Welsh, 242 U. S. 303 13
Erie Railroad Co. v. Winfield, 244 U. S. 170 .... 5, 10, 11, 15

Illinois Central Railroad Co. v. Behrens, 233 U. S. 473 13
Industrial Accident Commission v. Davis, 259 U. S. 182 14

Lindgren v. United States, 281 U. S. 38 13

New Orleans & Northeastern Railroad Co. v. Harris, 247 U. S. 367 13
New York Central Railroad Co. v. Marcone, 281 U. S. 345 .... 10, 11, 12
New York Central Railroad Co. v. Porter, 249 U. S. 168 .... 10, 11
New York Central Railroad Co. v. Winfield, 244 U. S. 147 .... 10, 11
North Carolina Railroad Co. v. Zachary, 232 U. S. 248 12

Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556 .... 13, 14

Supreme Court of the United States

October Term, 1941

No. .....

NEW YORK AND LONG BRANCH RAILROAD COMPANY,
Petitioner,

v.

THOMAS M. FURY,
Respondent and Appellee Below.

Petition for Writ of Certiorari to Monmouth County Court of Common Pleas, New Jersey, to Review the Judgment of the New Jersey Court of Errors and Appeals

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

On petition filed under the provisions of the New Jersey Workmen's Compensation Act (c. 95, Pamphlet Laws of New Jersey, 1911, as amended; now R. S. N. J. 1937, Title 34, c. 15), the Workmen's Compensation Bureau made an award of compensation on March 25, 1938 to petitioner's employee, Thomas M. Fury (Tr. pp. 179-184).

Fury, who was employed by petitioner as a signal maintainer at and in the area of petitioner's interlocking plant at Matawan Tower, Matawan, New Jersey, was struck and injured after dark on January 29, 1935, while on his way home from work, by the engine of a passenger train operated by and on a track of The Central Railroad Company of New Jersey near its connection with and intersection of petitioner's line at the Tower. The Jersey Central's track at the point at which the accident occurred was held below to be within the "domain" of the performance of Fury's duties as signal maintainer (Tr. pp. 207, 215) there apparently being no separate signal maintenance work by Jersey Central employees within the area of the particular interlocking plant. As finally determined below the accident occurred at such a time and place, and under such circumstances of employment, as to entitle Fury to recover compensation from petitioner under the provisions of said Workmen's Compensation Act allowing such a recovery without proof of the employer's negligence if the injury in question was caused by an accident arising out of and in the course of employment (R. S. N. J. 34:15-7, 8 and 9).

Fury's claim (Tr. p. 1) was challenged in petitioner's answer thereto (Tr. pp. 4, 5) upon the ground, among others, that petitioner was engaged in interstate commerce at the time of the accident and that Fury was likewise so engaged if his injury arose out of and in the course of his employment.

The Workmen's Compensation Bureau concluded that the accident did arise out of and in the course of Fury's employment with petitioner (Tr. p. 181), that neither petitioner nor Fury was engaged in interstate commerce at the time of the accident (Tr. p. 182), and accordingly, that the Federal Employers' Liability Act was inapplicable and that the Bureau had jurisdiction to award compensation under the Workmen's Compensation Act.

On appeal to the Monmouth County Court of Common Pleas the judgment of the Bureau was reversed and the award was set aside (Tr. p. 189) upon the ground that the accident did not arise out of and in the course of the employment (unreported opinion of Judge KNIGHT, Tr. p. 185).

Certiorari was first denied by a single justice of the New Jersey Supreme Court (Tr. p. 191) but subsequently granted by the court *en banc* (Tr. p. 199). Upon consideration of the merits, that court reversed the Pleas and affirmed the judgment of the Bureau (Tr. p. 209; opinion by Mr. Justice HEHER, Tr. pp. 203-209). The decision was that Fury "remained within the ambit of service" and was within his "domain of inspection" at the time of the accident.

The Court of Errors and Appeals, on October 29, 1941, affirmed the judgment of the New Jersey Supreme Court (Tr. p. 216; opinion by Mr. Justice PERSKIE, Tr. pp. 213-215). That court conceded that petitioner, at the time of the accident,—

> "was engaged in interstate transportation, or work so clearly related to it as to form a part of it" (Tr. foot of p. 214)

and further conceded that Fury,—

> "when actually at his work at the time of his injury may also be said to be included within the stated category of appellant (petitioner here)". (Tr. top of p. 215)

in other words, in the "category" of interstate commerce. The court nevertheless concluded that the case was not one "of *exclusive** jurisdiction under the Federal Employers' Liability Act", finding the undisputed proofs to be "that, at the moment of injury, respondent (Fury) was merely walking home from his work" (Tr. p. 215). The court thereupon added:

---

* Emphasis supplied.

"The fact that respondent (Fury) was within the ambit of his services, and the fact that he might have become properly engaged in work forming a part of appellant's interstate transportation, did not meet the determinative prerequisite of the fixed test of exclusive jurisdiction within the meaning of the Federal Employers' Liability Act, supra, namely, that respondent (Fury) was, at the moment of injury *actually* engaged in work which in fact formed a part of the interstate transportation in which appellant was engaged.

"The Bureau did have jurisdiction to entertain and determine respondent's (Fury's) claim petition for compensation and its judgment is free from Federal and State constitutional infirmities" (Tr. foot p. 215).

II

Jurisdiction

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended February 13, 1925, c. 229, 43 Stat. 937 (28 United States Code, sec. 344 (b)). Specifically, petitioner asserts "immunity" from the operation of the New Jersey Workmen's Compensation Act under and by virtue of the paramount and exclusive provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65*, (45 United States Code, § 51 *et seq.*).

As already stated, the judgment of the New Jersey Court of Errors and Appeals, sought to be reviewed, was entered on October 29, 1941 (Tr. p. 216). This petition for certiorari is filed on January 28, 1942.

---

* The amendment of August 11, 1939, c. 685, 53 Stat. 1404, was enacted subsequent to the accident involved in the case at bar.

III

Question Presented

The question involved is whether an employee of an interstate railroad carrier, employed as a signal maintainer to inspect, repair and maintain signal equipment, crossing signals, roadside train signals and switches at the carrier's interlocking plant controlling both interstate and intrastate commerce, who was injured while on his way home at the end of his day's work but while still within the ambit or domain of his employment, may recover compensation under a state law, or whether the Federal Employers' Liability Act is exclusively applicable.

IV

Reasons Relied on for the Allowance of the Writ

A. The decision of the New Jersey Court of Errors and Appeals as to the jurisdiction of the Workmen's Compensation Bureau of that state is in conflict with the decisions of this Court on the same matter in such cases as *Erie Railroad Company* v. *Winfield* (1916), 244 U. S. 170.

B. Assuming, without conceding, that *Erie Railroad Company* v. *Winfield, supra,* does not control the case at bar, then said New Jersey Court of Errors and Appeals has decided a federal question of substance not heretofore determined by this Court.

C. It is important to railroads engaged in interstate commerce (and subject as such to the jurisdiction of the Interstate Commerce Commission to which they report) and to the employees thereof, as well as of some public importance, to know whether an employee engaged in interstate activities and admittedly subject to the Federal

Employers' Liability Act during working hours steps out of that jurisdiction and into state jurisdiction merely by starting home at the end of the day.

WHEREFORE, petitioner prays that a Writ of Certiorari issued under the seal of this Court to review the judgment of the New Jersey Court of Errors and Appeals be directed to the Monmouth County Court of Common Pleas of the State of New Jersey, to which court the record in this case has been remitted, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings in the cause entitled Thomas M. Fury, Petitioner-Respondent, *vs.* New York and Long Branch Railroad Company, Respondent-Appellant, to the end that the cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said New Jersey Court of Errors and Appeals, dated October 29, 1941, affirming the judgment of the New Jersey Supreme Court, entered on December 24, 1940, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: January 28, 1942.

HOWARD L. KERN,
WILLIAM F. HANLON,
Counsel for Petitioner,
New York and Long Branch Railroad Company.